No. 13,602

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES V. McCONNELL and
MARGOT MURPHY McCONNELL,
Appellants,

vs.

PICKERING LUMBER CORPORATION,
Appellee.

APPELLANTS' PETITION FOR A REHEARING,

After Decision by the United States Court of Appeals for the Ninth Circuit, on November 18, 1954.

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To the Honorable William Denman, Chief Judge, and to the Honorables William Healy and Walter L. Pope, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

This Honorable Court, by its opinion filed herein November 18, 1954, has held that in pleading a case for reformation of a contract under Section 3399 of the Civil Code of California, and particularly that portion thereof authorizing reformation when, through the mistake of one party, which the other at the time knew or suspected, a written contract does not ex-

press the intention of the parties, it is necessary to plead an antecedent agreement or understanding between the parties to which the agreement can be reformed. It is respectfully submitted that in so holding the Court has departed from firmly established California law and from the general authority in such cases provided. It is to this point alone to which this petition for rehearing is most respectfully addressed.

ARGUMENT.

I.

IN AN ACTION FOR REVISION OF A CONTRACT ON THE GROUND OF THE MISTAKE OF ONE PARTY, KNOWN OR SUSPECTED BY THE OTHER, THE PLAINTIFF NEED NOT PLEAD ANY PRIOR MUTUAL AGREEMENT.

The decision of this Court proceeds upon the theory that in all actions for reformation under Section 3399 of the Civil Code of California there must have been a prior mutual agreement between the parties. *If this were so then it is submitted that relief by way of reformation could be granted under Section 3399 only in cases of mutual mistake.* And this despite the fact that Section 3399 is written in the disjunctive—"fraud *or* a mutual mistake * * * *or* a mistake of one party, which the other knew or suspected." Clearly, this section provides the remedy of revision under three types of circumstance, of which mutual mistake is only one.

By way of example let us suppose that A and B contracted to buy and sell the ship Peerless, and that

at the time the contract was signed A thought he was buying the large ship Peerless anchored in San Francisco Bay and well known in the Bay Area, and B knew this, but B was thinking of another ship Peerless anchored somewhere off the coast of Mexico. Further assume there had been no discussion or "antecedent agreement" of what ship Peerless was the object of sale. Would the court deny relief because A could not in good faith plead any "antecedent agreement?" The express provisions of Section 3399 are clearly calculated to afford the equitable remedy of reformation under such circumstances.

Closely analogous is *Wilson v. Moriarty* (1891) 88 Cal. 207 wherein the trial court ordered the reformation of a lease. The trial court made the following finding of fact, pages 208-209:

> "That when plaintiff executed said lease, she did not understand said lease to be a lease for ten years, with the privilege of ten years more, but she understood said lease to be for a single term of five years. And the defendant then and there, at the time of the execution of said lease by plaintiff, well knew that the plaintiff did not understand the same to be for ten years, with the privilege of renewal, and well knew that she understood the same to be for a single term of five years, and the defendant fraudulently induced the plaintiff to misunderstand said instrument and to execute the same under such misunderstanding."

In affirming the judgment below the Supreme Court said of this finding, page 209:

> "These facts, if justified by the evidence, undoubtedly support the judgment. Section 3399 of the Civil Code provides that 'when, through * * * a mistake of one party, which the other, at the time, knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith, and for value.' "

The *Wilson* case has never been overruled. It is good law today.

Another case in point is *Stevens v. Holman* (1896) 112 Cal. 345, an action to reform a mortgage. The parties here were substituting a new note and mortgage, cancelling the old. The respondent mortgagee had supposed he was getting a mortgage covering more land than was the case. At page 349 the Supreme Court stated the facts as follows:

> "Respondent supposed that the description did include all such land, and accepted the mortgage under the mistaken notion that he was thereby getting a lien upon all the land which appellants had promised to mortgage. Appellants knew that the description did not embrace all said land; but they, and each of them, 'knew that plaintiff believed that the mortgage, as executed by them to him, did include all the land they, and each of them, had agreed to mortgage as aforesaid, and that plaintiff was deceived in so believing, and took and accepted said mortgage with the mistaken belief that the same did embrace all the

land said defendants had agreed to mortgage to him.' "

In affirming the judgment of the trial court authorizing reformation, the court said, at page 352:

"Most of the adjudged cases upon the subject deal with mutual mistakes; but the code provides expressly for the kind of mistake involved in this action. By section 3399 of the Civil Code it is enacted as follows: 'When, through fraud or a mutual mistake of the parties, or a mistake of one party, *which the other at the time knew or suspected,* a written instrument does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it may be done without prejudice to rights acquired by third parties in good faith.' " (Emphasis supplied by the court).

Attention is also invited to *Carpenter v. Froloff* (1939) 30 C.A. (2d) 400, wherein a judgment of nonsuit in favor of defendant was entered by the trial court, which judgment was reversed and the cause remanded on rehearing by the District Court of Appeal. At page 408 the court said:

"Although a reversal of the judgment is required, we have for the guidance of the trial court on a retrial, given consideration to appellants' contention that the remedy of reformation of a contract is to be granted only for the purpose of making the contract conform to the mutual agreement and intention of the parties thereto; *but in this state mutuality is not always necessary.* It is sufficient if there was, as is alleged

> in the pleadings here, 'a mistake of one party, which the other at the time knew or suspected' (Civ. Code, sec. 3399); and the pleadings herein set forth the facts showing a mistake of that character. (*Auerbach v. Healy,* 174 Cal. 60 (161 Pac. 1157).)" (Emphasis supplied.)

The foregoing is cited as a correct statement of California law. The facts of the case reveal some prior understanding between the parties of what was intended to be conveyed. This circumstance of prior understanding exists in some, but not all of the cases. The existence of such circumstances does not detract from the force of the legal statement, and does not justify this Honorable Court in casting aside the correct statement of the legal principle, which is precisely what this Court has done in respect of the following cases:

Eagle Indemnity Co. v. Industrial Accident Commission (1949) 92 C.A. (2d) 222, 229;
F. P. Cutting Co. v. Peterson (1912) 164 Cal. 44, 50;
Burton v. Curtis (1928) 91 C.A. 11, 13;
Bank of America v. Granger (1931) 115 C.A. 210, 220;
Auerbach v. Healy (1916) 174 Cal. 60, 63.

In the latter case the Supreme Court of this State said:

> "It is necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear."

Here is the rule of pleading as to mutual mistake. The Court then immediately goes on to cite the rule of pleading required in the type of case before this Court, as follows:

> *"In this state mutuality is not always necessary. It is sufficient if there was 'a mistake of one party, which the other at the time knew or suspected.'* (Civ. Code, sec. 3399.) *But the facts showing a mistake of that character, in such a case, must likewise be alleged."* (Emphasis supplied.)

We agree that *in cases of mutual mistake* one must plead the prior understanding, because the prior understanding furnishes the standard to which the mistakenly executed agreement must be reformed. But if there is no prior *mutual* agreement this is no reason to deny relief under the other circumstances provided for in Section 3399. And certainly it cannot be said that these other circumstances are to lose their vitality because there was no prior mutual agreement—a circumstance not contemplated, or always possible in cases of fraud or the mistake of one known or suspected by the other.

In this latter case—the mistake of one, which the other at the time knew or suspected—the court is not without a standard to which the contract can be reformed. The standard here is that stated in *Eagle Indemnity Co. v. Industrial Accident Commission* (1949) 92 C.A. (2d) 222, 229, to-wit:

> "The contract which was intended by the party acting under unilateral mistake known or sus-

pected by the other, is as a matter of law, the contract of the parties."

It is respectfully submitted that this is not only good California law, it is also recognized by leading text authorities. To illustrate we refer to 3 *Corbin on Contracts* page 445 where in discussing this very question it is said:

> "In some cases one who knows of another's mistake and says nothing will find himself bound by a contract that he did not intend to make. Suppose one party assents to a writing, being mistaken as to the terms that it contains or as to the ordinary meaning of the terms that it contains; and the other, with knowledge of this mistake, likewise assents. *The language of an agreement will be interpreted according to the meaning given to it by one party if the other had actual knowledge that such was the meaning so given.* It is certain that such a bad actor will not be permitted to enforce the agreement according to its words in their usual meaning. The mistaken party is certainly entitled to rescission; but he may, instead, get reformation and enforcement as reformed." (Emphasis supplied.)

At pages 468-469 of the same work Mr. Corbin says this:

> "Reformation may be a proper remedy *even though the mistake is not mutual.* If one of the parties mistakenly believes that the writing is a correct integration of that to which he had expressed his assent and the other party knows that it is not reformation may be decreed. The conduct

of the other party in permitting the first to execute the erroneous writing and later attempting to enforce it may be regarded as fraudulent; *but it is enough to justify reformation that he knows the terms proposed by the first party and the meaning thereof and leads that party reasonably to believe that he too assents to those terms. This makes a contract; and the writing may be reformed to accord with it.* The fact that the first party was negligent in failing to observe that the writing does not express what he has assented to does not deprive him of this remedy." (Emphasis supplied.)

The rule is stated somewhat less precisely in 45 *Am. Jur.* p. 621 wherein *Stevens v. Holman,* 112 Cal. 345, is cited among supporting authority.

Section 505 of the *Restatement of the Law of Contracts* states the proposition laid down in the *Eagle Indemnity* case, supra, this way:

"If one party at the time of the execution of a written instrument knows not only that the writing does not accurately express the intention of the other party as to the terms to be embodied therein, *but knows what that intention is,* the latter can have the writing reformed *so that it will express that intention.*"

"Comment:

a. Under the rule stated in §71 (c) knowledge by one party that the other is under a mistake as to the meaning of his words or acts prevents them from operating as an offer or acceptance. In cases covered by the rule stated in the present

Section, there may be therefore not even a voidable contract; but knowledge of one party not only that the other party's intention is something different from what the writing expresses, but also what that intention is, *is sufficient ground for reforming the writing to conform to the unexpressed intention.* * * *

b. The rule stated in this Section is applicable whether the mistake was caused by misrepresentation by the other party or not.

Illustration:

1. A and B enter into a written contract for the transfer by A to B of certain land. B believes the conveyance contracted for will transfer ownership of underlying minerals, whereas it will not. A knows B's belief when the contract is executed. It will be reformed *to conform to B's understanding."* (Emphasis supplied.)

The California Annotations specifically state that this section is in accord with California Law. The early California cases, *supra,* bear this out, as does the *Eagle Indemnity* case.

In short, the concepts of offer and acceptance, of the meeting of minds, of mutuality, are not conditions precedent to the reformation of a contract executed under a mistake by one party which the other at the time knew or suspected. In this type of mistake the contract intended by the party acting under mistake is, as a matter of law, the contract of the parties. The agreement intended by the mistaken party becomes the real agreement of the parties.

II.

THIS IS A CASE BORDERING ON FRAUD— EQUITY IS REQUESTED.

A perplexing aspect of this case is that appellants, in filing their amended complaint, abandoned their claim based upon mutual mistake because they could not honestly plead any "antecedent agreement," and rested their claim for reformation on their mistake, known or suspected by the respondent. This claim *is pleaded in the very language of the statute* (C.C. Sec. 3399)—not once, but twice (Transcript of Record, pp. 35 and 39). And still appellants are held required to plead a case of *mutual mistake.* We do not claim mutual mistake, but a mistake of appellants which respondent at the time knew or suspected. What did respondent know or suspect? The fact the written contract did not express the intention of appellants.

In concluding its opinion this Honorable Court observes we make no claim to the existence of other facts to bolster the amended complaint. We make no claim to the existence of other facts to support any theory of mutual mistake.

We did develop facts in the depositions of the several parties to this litigation which most assuredly bolster the case under that portion of Section 3399 of the Civil Code upon which we rely.

Appellants case, very briefly, is that Mrs. McConnell wanted price protection in the event respondent bought her uncle John Ducey's interest, or any part of his interest for a higher price than that paid to her. Respondent knew this. We now know from the

depositions that respondent drafted the language of Section 10 A of the contract under the full realization it would undoubtedly be forced to buy a portion of John Ducey's interest before the year 1950. Respondent intentionally then set about drawing the language of the contract so clearly as to exclude any increase in price to Mrs. McConnell unless they bought *all* of John Ducey's interest. Despite all this, an officer of respondent thereafter negotiated in New York City with Mrs. McConnell, her husband and her lawyer and carried on the representation respondent would never buy less than all of John Ducey's interest. And so the contract was executed, and eventually respondent purchased a part of John Ducey's interest, just as it knew it would when respondent drafted the contract language.

By its opinion this Honorable Court seems to criticise appellants for not seeking to further amend their amended complaint between the time of the order of dismissal and the entry of judgment of dismissal. We respectfully submit this would have been a useless act in view of the conclusion by the trial court that appellants had to plead a prior agreement. Furthermore, the judgment of dismissal was an appealable order.

The mistake of one party, at the time known or suspected to the other, frequently involves situations bordering upon fraud, if not actual fraud. Our code section 3399 covers both fraud and the mistake of one, so that neither eventuality will be denied equitable relief. Mr. Williston recognizes these distinctions and overlaps in quoting from Thayer, Unilateral Mis-

take As a Ground for the Avoidance of Legal Transactions, Harvard Legal Essays (1934) 467, 468, as follows:*

> "The situation in which the mistake is truly unilateral is where one person is aware of the other's error. This is treated in Roman and Continental law under the heading of fraud and is more and more coming to be so considered with us."

We sincerely believe that this case is one demanding the relief of equity; that the denial thereof would result in a manifest injustice and a deviation from the objects and purposes of Section 3399 of the Civil Code.

Upon the foregoing grounds we earnestly submit that this petition for rehearing should be granted by this Honorable Court.

Dated, San Francisco, California,
December 8, 1954.

Respectfully submitted,
HERBERT BARTHOLOMEW,
PEMBROKE GOCHNAUER,
Attorneys for Appellants and Petitioners.

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*5 Williston on Contracts (Rev. Ed.), pp. 4387-4388.

Certificate of Counsel.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 8, 1954.

Herbert Bartholomew,
Of Counsel for Appellants and Petitioners.